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IN THE SUPREME COURT OF THE STATE OF OHIO

No. 29622

NATHAN KOPLIN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE OHIO NATIONAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellant,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY,

Appellee.

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States the above-named petitioner and appellant files this, his separate statement, particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Ohio appealed from herein, as follows:

Basis of Jurisdiction

Petitioner says that this cause comes into the Supreme Court of the United States on appeal as of right from a final judgment rendered in the Supreme Court of the State of Ohio which is the highest court of said state in which a

decision in this cause could be had where there was drawn in question the validity of Sections 9364-1 to 9364-8, both inclusive, of the General Code of Ohio, on the ground of their being repugnant to Paragraph 1 of Section 10 of Article I and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the decision was in favor of their validity.

Petitioner says that the United States Code Sections 344(a) and 861(a) of Title 28 are the basis upon which petitioner contends that the Supreme Court of the United States has jurisdiction to review the judgment in question. Said sections read, in part, as follows:

> "Sec. 344(a). A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."
>
> "Sec. 861a. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Statute Involved

The statute involved in this case was an act passed by the Legislature of the State of Ohio on July 17, 1941, to revise the laws relating to the conversion of stock life in-

surance corporations into mutual life insurance corporations and for that purpose to amend Sections 9364-1, 9364-2 and 9364-3 of the General Code of Ohio and to enact Sections 9364-2a, 9364-2b, 9364-4, 9364-5, 9364-6, 9364-7 and 9364-8 of the General Code. Said statutes are set out verbatim in Appendix A attached to this statement.*

Date of Judgment

The date of the judgment of the Supreme Court of the State of Ohio sought to be reviewed is May 31, 1944. An application for rehearing was filed in accordance with the rules of said Court and was denied on June 14, 1944. The date upon which the application for appeal was presented to the Chief Justice of the Supreme Court of the State of Ohio was July 31, 1944.

Nature of the Case

This cause involves the question whether by a proposed plan of mutualization a stock life insurance company organized under the laws of the State of Ohio may be converted into a mutual life insurance company and as a result of such conversion the stockholders of the stock life insurance company may be paid in the aggregate Three Million Three Hundred Fourteen Thousand Three Hundred Twenty Dollars ($3,314,320) out of the capital structure of said stock life insurance company pursuant to Sections 9364-1 to 9364-8, both inclusive, of the General Code of Ohio, without impairing the vested rights of policyholders in the capital structure of said insurance company, and in that respect whether Sections 9364-1 to 9364-8, both inclusive, of the General Code of Ohio, are unconstitutional, null and void in that they are repugnant to Paragraph 1 of Section 10 of ARTICLE I of the Constitution of the United States which

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* (Clerk's Note—These statutes are printed as Appendix "A" to the Jurisdictional Statement in the case of No. 450, October Term, 1944.

provides that no state shall pass any law impairing the obligation of contract, and repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides, "Nor shall any state deprive any person of life, liberty or property without due process of law".

The judgment of the Supreme Court of Ohio in this cause affects adversely numerous policyholders of the appellee residing in twenty-seven (27) of the United States.

The stage of the proceedings in the court of first instance and in the appellate courts at which and the manner in which the federal questions sought to be reviewed were raised and the way in which they were passed upon by the Court, are all set forth in the Petition for Appeal and for the sake of brevity will not be restated.

The ruling on the Demurrer in the Court of Common Pleas is found on page 21 of the Record. The ruling on the Demurrer in the Court of Appeals is found on pages 23 and 24 of the Record.

The judgment of the Supreme Court of Ohio is found on page 60 of the Supreme Court Record and the order denying the application for rehearing is found on page 61 of the Supreme Court Record.

The Opinion of the Court of Common Pleas of Summit County, Ohio, denying the constitutionality of said statutes, has been reported in 10 Ohio Supplement, page 12, and is found in 45 North Eastern (2nd).

The Opinion of the Court of Appeals of Summit County, Ohio, sustaining the constitutionality of the said statutes has been reported in 73 O. App. 267.

The Opinion of the Supreme Court of Ohio, affirming the judgment of the Court of Appeals of Summit County, Ohio, has been reported in 143 O. S. 329.

The Undisputed Facts in the Record

This cause comes into this Court in company with No. 450, Scott A. Belden, on behalf of himself and all other policyholders of *The Union Central Life Insurance Company* vs. *The Union Central Life Insurance Company.* The two causes were argued together in the Court of Common Pleas of Summit County, Ohio, the Court of Appeals of Summit County and the Supreme Court of the State of Ohio, and were made the subject of a joint opinion in each court.

The question presented in this cause is identical with the question presented in the Union Central cause; that is, the constitutionality of the Ohio law permitting stock life insurance companies to convert themselves into mutual life insurance companies.

The Petition (R. 3) and the Answer (R. 14) set out fully the operative facts in this cause.

In general, the facts are substantially like those involved in the Union Central cause. After the Legislature of Ohio enacted Sections 9364-1 to 9364-8, both inclusive, of the General Code, The Ohio National Life Insurance Company proceeded with a plan to convert itself into a mutual life insurance company. Its directors and stockholders adopted the plan and the Answer alleges that the policyholders duly approved the plan and the Answer alleges that the policyholders duly approved the plan (R. 16).

The Ohio National Life Insurance Company began business as a stock life insurance company on September 23, 1910 and does business and has policyholders in twenty-seven (27) of the United States (R. 15). It has outstanding 82,858 shares of capital stock, each having a par value of Ten Dollars ($10.00) (R. 15). The Answer admits that the plan includes payment to stockholders of Forty Dollars ($40.00) per share (R. 16), a total of $3,314,320.00. The

Answer alleges that the shares of the stockholders are to be purchased by the Board of Directors from time to time as funds are available (R. 16). The appellant became a non-participating policyholder with privilege to exchange for paid-up participating policy in the appellee on October 8, 1931 (R. 4, 5, 6 and 15).

The facts in this cause differ from those in The Union Central Life Insurance Company cause principally in that:

(a) The pleadings show no limitation upon the amount of dividends which may be paid to shareholders.

(b) The pleadings show that appellant's policy is now a nonparticipating policy which may be exchanged for a participating policy when it is fully paid up.

We adopt, by reference, all of the arguments made in the Statement as to Jurisdiction filed in the *Union Central* case. That policyholders have rights in the surplus of a life insurance company: that they are entitled to have the capital retained as security for their claims as creditors; that such rights are vested; that mutualization will deprive them of such rights and impair their contracts; that such impairment and deprivation results from unconstitutional legislative acts; and that the Ohio act unlawfully delegates legislative powers, are propositions fully argued in that brief. The whole of that argument applies equally to Ohio National.

The fact that Koplin's policy is now a non-participating policy requires no different conclusion than that to be reach in the *Union Central* case, where Belden holds a participating policy, and that the Company issues only participating policies. Koplin's right to receive a participating policy exists now. The participation value will be destroyed or diminished if the company's surplus and capital are removed. Accordingly he is deprived of a present right.

The defendant tacitly admits plaintiff's allegation that payment of $3,314,320 to stockholders would not only wipe out all its capital and surplus, but would cut into policy reserves to the extent of more than $1,000,000 (R. 10). It says, however, that it wants to pay out the $3,314,320 "from time to time as funds are available", and indicates, thereby, that it recognizes that it could not pay out the entire amount at one time. In this respect, it is unlike Union Central which expects to pay off the stockholders at one time, and not "from time to time".

But the mere assertion that the Board of Directors will make payments from time to time "as funds are available" helps no one. The plan, when adopted, will permit them to wipe out all the capital and surplus in one day. Of course they cannot invade the policyholders reserves. The grant of authority to the Directors to wipe out the capital and surplus impairs the value of the plaintiff's contract, for no one, save the Board, can know on what day the structure of the company will be demolished.

The conclusion in this case ought to be the same as the conclusion in the *Union Central* case: i. e., that the Ohio Mutualization Act offends against the Federal constitution; and that the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

CHARLES F. SCHNEE,
ROBERT GUINTHER,
Attorneys for Petitioner.

Note: The opinion in this case is printed as an appendix to the Jurisdictional Statement in No. 450.

OCT 14 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 597

NATHAN KOPLIN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE OHIO NATIONAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellant,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

VIRGIL D. PARISH,
Counsel for Appellee.

BETTINGER, SCHMITT & KREISS,
BUCKINGHAM, DOOLITTLE & BURROUGHS,
Of Counsel.

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 29622

NATHAN KOPLIN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE OHIO NATIONAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellant,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY

Appellee.

COUNTER-STATEMENT OF APPELLEE AS TO JURISDICTION AND MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT.

Counter-Statement of Appellee as to Jurisdiction

Pursuant to the provisions of Rule 12, Paragraph 3, of the Supreme Court of the United States, appellee files its counter-statement disclosing certain matters and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant.

No Federal Constitutional Question Is Presented by the Record in This Case

Appellant's attack upon the Mutualization Act (Sections 9364-1 to 9364-8 of the Ohio General Code) was twofold,

as stated by the Ohio Supreme Court 143 O. S. 329, pages 339 and 340:

> 1. That the act is void because it delegates legislative power to the Superintendent of Insurance in violation of the *Ohio* Constitution.
>
> 2. That the act is unconstitutional and void because the *operative effect* thereof as applied to the plan of mutualization adopted by appellee results in the impairment of the obligation of Apellants' contract and amounts to the taking of his property without due process of law.

The first did not involve the Constitution of the United States. Indeed the petition of the Appellant specifically limits that claim to a violation of the *State* Constitution (See printed record in Ohio Supreme Court pp. 9 & 17). The Court in holding that there was no delegation of legislative power passed upon a state constitutional question, not a federal constitutional question.

Having disposed of that State question the Supreme Court (on p. 350) stated that the only remaining question was

> "Whether upon the *record as presented* we can say that the obligation of the contracts between the policyholders and the Union Central or Ohio National are impaired, or that the policyholders are deprived of their property without due process of law."
> (Italics ours).

The Court assumed that appellant had presented no claim that the law, per se, was in violation of the federal constitution, and that the only contention presented was that the law was unconstitutional "because of its operative effect upon a particular state of facts."

The Court then concluded that the appellant had not shown a "presently existing state of facts which makes the Act unconstitutional when applied thereto."

The basis for this conclusion is stated by the Court on pp. 351 & 352 as follows:

> "Under the plan in controversy in the Koplin case the shares of stock are to be acquired from time to time as funds are available.
>
> Section 9364-2b specifically provides in part:
>
> '* * * Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of the corporation * * *'
>
> By virtue of the provisions of Section 617, it is the mandatory duty of the superintendent to see that the law relating to insurance, including the above-quoted part of Section 9364-2b, is duly executed and enforced.
>
> We assume that the superintendent will do his full duty, and if that be true, these policyholders will not be deprived of their property without due process of law, nor will the obligation of their contracts be impaired.
>
> In the case of STATE, EX REL. HERBERT v. FERGUSON, AUDITOR, 142 Ohio St., 496, 52 N. E. (2d), 980, this court by a unanimous decision held 'constitutional questions will not be decided *until the necessity for a decision arises on the record before the court.*' "

The claim set forth in the petition and the amendment thereto was that "if said Statute allows the alleged plan of mutualization to be consummated under the terms and conditions set forth in said alleged plan of mutualization and under the circumstances hereinafter alleged said statute is unconstitutional" as being repugnant to the impairment of the obligation of contracts and due process clauses of the United States Constitution.

It is then alleged that under the proposed plan the Appellee was to use the entire capital and surplus and a

part of the policyholders' reserves to purchase the stock, and also that it would take away from the policyholders that part of the capital structure which the policyholders contributed.

Appellee denied all of those averments, and alleged that the plan provided for the purchase of stock *from time to time* as the funds of the Company would permit. This averment necessarily implied that such acquisitions would be subject to all the restrictions contained in the Act, to the approval of the Superintendent of Insurance as required by the Act, and to the general power of the Superintendent under the Insurance Code to safeguard the rights of the policyholders.

Appellant chose to demur, thus admitting the averments in the Answer. He offered no evidence to sustain the above mentioned controverted averments in the petition. Hence there is no proof in the record to support those averments.

With the record in that state the only claim left to the appellant was that the policyholders had a vested right to have the capital stock and surplus held intact forever for their benefit, and that, therefore, the use of any of that capital and surplus to purchase stock under the plan took away their property and impaired their contracts. The Supreme Court on two previous occasions had decided that under the Ohio Statutes the policyholders had no such right. Those holdings were re-affirmed by the Court in the present case. Certainly such a determination of the effect of State laws is solely within the province of the State Court and raises no federal question.

It was upon this record and the established law of Ohio that the Ohio Supreme Court found that there was no showing "of a presently existing state of facts which makes the act unconstitutional and void when applied thereto."

This case did not present a question as to whether appellant's loss of right is within or without the Constitution. The finding is that he has lost no rights. He has shown

neither a loss of property nor impairment of contract. He has offered no facts in support of either. Whether within the terms of the Ohio Mutualization Act such a mutualization might be undertaken as would result in an unconstitutional taking of property or impairment of contract will of necessity await a case in which there is a showing of the taking of property or some impairment of contract right.

For this court at this moment to enter upon a consideration of any constitutional question would be as unwarranted as for a court of last resort in any circumstances to engage in a reconsideration of facts. The facts have been so determined in the Ohio courts as to leave no question under the Constitution.

Hence, it appears that there is here involved no determination with which upon review this court could conceivably differ. To put it othewise there is involved no question, even remotely substantial, arising under the Constitution of the United States.

Motion to Dismiss Appeal or, in the Alternative, to Affirm

Pursuant to Section 12, Paragraph 3, of the Rules of the Supreme Court of the United States, appellee respectfully moves that the appeal be dismissed or, in the alternative, that the judgment be affirmed on the grounds herein set forth in its Counter-statement of Facts as to Jurisdiction.

Respectfully submitted,

VIRGIL D. PARISH,
Counsel for Appellee.

Of Counsel:
BETTINGER, SCHMITT & KREIS,
WALTER SCHMITT;
BUCKINGHAM, DOOLITTLE & BURROUGHS,
GILLUM H. DOOLITTLE.

No. 597. KOPLIN *v.* OHIO NATIONAL LIFE INSURANCE Co. Appeals from the Supreme Court of Ohio. November 13, 1944. *Per Curiam:* In each of these cases the motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *Petrie* v. *Nampa & Meridian Irrigation District,* 248 U. S. 154, 158. *Messrs. Charles F. Schnee* and *Robert Guinther* for appellants. *Messrs. Frank F. Dinsmore* and *Virgil D. Parish* for appellee in No. 450. *Mr. Virgil D. Parish* for appellee in No. 597. Reported below: 143 Ohio St. 329, 56 N. E. 2d 177.